

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

|                      |   |                            |
|----------------------|---|----------------------------|
| THE CITY OF          | . | Case No. 2:17-CV-03894-MMB |
| PHILADELPHIA,        | . |                            |
|                      | . |                            |
| Plaintiff,           | . | U.S. Courthouse            |
|                      | . | 601 Market Street          |
| v.                   | . | Philadelphia, PA 19106     |
|                      | . |                            |
| JEFFERSON BEAUREGARD | . |                            |
| SESSIONS, III        | . |                            |
|                      | . |                            |
| Defendant.           | . | September 12, 2017         |
| . . . . .            | . | 1:29 p.m.                  |

PRETRIAL CONFERENCE TRANSCRIPT  
BEFORE HONORABLE MICHAEL M. BAYLSON  
SENIOR UNITED STATES DISTRICT JUDGE

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|                       |  |
|-----------------------|--|
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I N D E X

|                                      | PAGE |
|--------------------------------------|------|
| COURT QUESTIONS                      | 6    |
| COURT ENTERS ORDER                   | 11   |
| MS. GIBSON ADDRESSES REASON FOR SUIT | 12   |
| MR. TULANTE ADDRESSES THE COURT      | 12   |
| MS. SOLOW SUMMARY OF LEGAL ISSUES    | 17   |
| CERTIFICATE OF COURT REPORTER        | 21   |

|          |     |      |
|----------|-----|------|
| EXHIBITS | ID. | EVD. |
| NONE     |     |      |

1 JUDGE MICHAEL BAYLSON: Please be seated. Okay. We  
2 have counsel for the government -- okay. Hello, good  
3 afternoon.

4 Hello.

5 MR. ARJUN GARG: Good afternoon, Your Honor.

6 THE COURT: Oh, hi. Good afternoon.

7 MR. GARG: This is Arjun Garg of the U.S. Department  
8 of Justice. Also with me is John Tyler of the Department of  
9 Justice. Thank you for permitting us to appear by telephone  
10 today.

11 THE COURT: Not a problem. All right. Thank you  
12 very much.

13 And let me introduce to you the people who are here  
14 in the courtroom. First, we have the City Solicitor, Mr.  
15 Tulante. Good afternoon.

16 MR. SOZI TULANTE: Good afternoon, Your Honor.

17 THE COURT: And we have Virginia Gibson, who is  
18 counsel for the plaintiff. Along with Sara Solow, who is --

19 MS. SARA SOLOW: Good afternoon.

20 THE COURT: -- also co-counsel. And we have Mr. Heim  
21 and Ms. Leone and some other people who I don't -- do they want  
22 their appearances noted on the record, Ms. Gibson?

23 MS. VIRGINIA GIBSON: Yes, Your Honor. Jasmeet Ahuja  
24 and Alex Bowerman from Hogan Lovells are also with us.

25 THE COURT: Okay. Good afternoon, everybody.

1 MR. MARCEL PRATT: And Marcel Pratt.

2 THE COURT: All right. Good afternoon to you too.

3 Okay. The first thing I would like to do is just put  
4 on the record a number of relationships that I have with people  
5 involved in this case. The first thing I want to mention is  
6 that Attorney General Sessions and I were U.S. Attorneys  
7 together and we served in that capacity for about four years.  
8 And I think he was a U.S. Attorney for a longer time, but that  
9 was my tenure. And I got to know him during that time. I  
10 don't really think I've had any real contacts with him since  
11 then. It was a long time ago, but I just mention it.

12 In addition, I have a number of former law clerks who  
13 are working in the Department of Justice. And I have no  
14 knowledge that they're working in any way on this case, not  
15 that that would make any difference.

16 Ms. Gibson, who appears to be lead counsel for the  
17 plaintiff, was an Assistant U.S. Attorney who worked under me  
18 for a period of time, for whom I have a very high regard. And  
19 Sara Solow, who is here, was my law clerk three years ago, I  
20 think. And I have a very high regard for her as well.

21 And I've known Mr. Heim for many years. We've been  
22 co-counsel on cases and he's involved in some other cases here.  
23 And we've had a social relationship.

24 And Judy Leone is a frequenter of the opera. And she  
25 and I see each other at opera performances and have chatted on

1 different occasions about that.

2           So if anybody has any problem with my proceeding as  
3 the judge assigned to this case because of any of those, you're  
4 welcome to file whatever you think is relevant with the clerk.  
5 I don't see any of those relationships as interfering with my  
6 abilities here.

7           Having said that, I want to express my appreciation  
8 to counsel for preparing the joint case management proposal  
9 which responded to a number of the issues that I had raised.

10           The -- I have a couple of comments or questions. And  
11 the first question is whether the city has come to any more  
12 definite strategies to whether it's going to file a motion for  
13 preliminary injunction?

14           MS. GIBSON: Your Honor, at this time we have not.  
15 We did learn information yesterday as reported to us about  
16 argument. In the preliminary injunction motion filed by the  
17 City of Philadelphia, that the Justice Department in opposition  
18 to that motion has published the conditions, the specific  
19 conditions, that it expects to --

20           THE COURT: Just pull the microphone closer, please?

21           MS. GIBSON: Did I say -- I don't know what I said.

22           Has -- the DOJ has published the specific conditions  
23 that it expects to impose on September, on or about September  
24 30<sup>th</sup> with respect to Philadelphia as well as other cities. And  
25 it is our -- and we just reviewed -- received those yesterday

1 and are reviewing them.

2 We are not optimistic at this point in time, Your  
3 Honor, that we will be able to avoid filing a motion for  
4 preliminary relief. But we will know -- we will know more  
5 certainly September 30 when those conditions are published to  
6 the City of Philadelphia specifically. And at that time we  
7 will again be considering what options the city has in this  
8 litigation or otherwise with respect to the grant.

9 THE COURT: All right. So you don't anticipate  
10 filing that before September 30<sup>th</sup>?

11 MS. GIBSON: That is correct, Your Honor.

12 THE COURT: All right. And then -- now, if you did  
13 file that, approximately how much time do you think you would  
14 need for a hearing? Do you have any opinion about that?

15 MS. GIBSON: I -- we -- I would estimate that the  
16 city will have, to the extent that we present evidentiary  
17 testimony of witnesses, I would expect we would have three to  
18 five witnesses, Your Honor. So that could take a day to a day-  
19 and-a-half.

20 THE COURT: Okay. All right. Now, I was curious  
21 that neither party signed the need for any discovery at this  
22 time. Would that change if you filed a motion for preliminary  
23 injunction?

24 MS. GIBSON: The city does not view discovery as  
25 essential to the arguments that it is making. These are

1 largely legal arguments.

2 THE COURT: All right. Okay. Mr. Garg, do you --  
3 what about you?

4 MR. GARG: From the government's perspective, Your  
5 Honor, I think we would have to see the motion before we could  
6 really opine on that. As a general matter, I don't think we  
7 would expect to engage in discovery on a motion like that.  
8 However, the possibility of putting witnesses up at an  
9 evidentiary hearing might prompt us to get some discovery about  
10 that kind of evidence that's going to be presented. But the  
11 bottom line is it would be difficult for me to say at this  
12 time.

13 THE COURT: Okay. All right. Does the defendant  
14 have any better idea whether you're going to file an answer or  
15 a Rule 12 motion?

16 MR. GARG: Your Honor, I think we will reserve on our  
17 flexibility in that respect. I do anticipate it is likely that  
18 we will move to dismiss some or all these claims. But again, I  
19 think that's a topic better reached later on when the --

20 THE COURT: All right.

21 MR. GARG: -- battle lines are clearer.

22 THE COURT: All right. Well, I have to express to  
23 all of you that although I appreciate your coming to agreement,  
24 in a case of this nature which there's a great deal of public  
25 interest, I just think these time lines are too extended.



1           And I'd like to move the government's response up  
2 from October 30<sup>th</sup> to somewhere in mid-October. And then we, if  
3 a Rule 12 motion was filed, then the briefing would move up and  
4 we'd have the argument some time in early November. I mean I  
5 intend to prioritize this case on my own calendar because of  
6 the public interest involved.

7           And I -- I mean I -- Mr. Garg, you're, I know you're  
8 representing the government in all of these different lawsuits  
9 in different parts of the United States, I assume; is that  
10 correct?

11           MR. GARG: Yes, Your Honor, obviously the Department  
12 of Justice speaks as one.

13           THE COURT: Right.

14           MS. GARG: So --

15           THE COURT: Okay. But and I would presume that the  
16 plaintiff's counsel in this case will have some liaisons with  
17 plaintiff's counsel and the other cities that have filed. And  
18 I presume that if the government files a Rule 12 motion in any  
19 cases -- have you responded to any of the other complaints yet,  
20 in Chicago or San Francisco or California?

21           MR. GARG: No, Your Honor.

22           THE COURT: Okay. Well, I don't want to curtail  
23 anybody's ability to represent their clients well, but since I  
24 know very well the capabilities of the plaintiff's lawyers in  
25 Philadelphia, I presume that the other cities have counsel who

1 are equally proficient and able to do topnotch legal work on a  
2 more expedited basis.

3           So I'd like to -- I'd like to adjust those dates, to  
4 tell you truth. I'd like the response to the complaint to be  
5 due October 13<sup>th</sup>. And then allowing two weeks for it, the  
6 usual 14 days, for the response; that would be due October  
7 27<sup>th</sup>. And the reply brief in my usual case management program  
8 is seven days; and that would be due November 3<sup>rd</sup>. And I will  
9 schedule an argument for the week of November 6<sup>th</sup>.

10           Now, is that a hardship personally or professionally  
11 on anybody? Let me know.

12           All right. Ms. Gibson?

13           MS. GIBSON: Not for plaintiffs, Your Honor.

14           THE COURT: All right. Mr. Garg?

15           MR. GARG: Your Honor, I'm just glancing at my  
16 calendar here to make sure.

17           THE COURT: Well, I know you're not going to be the  
18 only one working on this case.

19           MR. GARG: That is correct, Your Honor. It's  
20 acceptable to the government.

21           THE COURT: Yes. But you're lead counsel; is that  
22 correct? All right.

23           MR. GARG: That is correct, Your Honor.

24           THE COURT: All right. Any problem with those dates?

25           MR. GARG: No, Your Honor.

1 THE COURT: Okay. Well, I'll -- then I'll enter an  
2 order with those dates. And then -- now, obviously if an  
3 answer is filed, the whole thing becomes moot. But even if  
4 there's a Rule 12 motion in part, I think that should be the --  
5 that should give everybody enough time to deal with the legal  
6 issues. And if there's a preliminary injunction motion filed,  
7 I will -- I may -- if you ask, if you want me to reconsider  
8 those dates because of a preliminary injunction motion, I'll  
9 come back to it at that time because that might -- that would  
10 take priority, I think.

11 MS. GIBSON: Thank you, Your Honor.

12 THE COURT: All right. And I also would expect that  
13 there's going to be coordination among the plaintiff's counsel  
14 in these different four cases. Am I correct, there are only  
15 four cases so far as -- is that correct?

16 MS. GIBSON: That's all we know about, Your Honor.

17 THE COURT: Okay. So I presume that you're -- you'll  
18 be trading briefs and things like that. And I have no  
19 intention of contacting any of the other judges. None of them  
20 have contacted me. But that covers what I wanted to review  
21 with you this afternoon.

22 Does anybody on the plaintiff's side want to bring up  
23 any other issues?

24 MS. GIBSON: Your Honor, we have no issues  
25 procedurally, but if we may for a moment take a time to explain

1 to the Court the reason for the bringing of the suit at this  
2 time?

3 THE COURT: Yes.

4 MS. GIBSON: Yes, certainly. Plaintiff -- there are  
5 many unknowns in this case because we're not in a normal  
6 situation for the -- we, the City of Philadelphia, are not in a  
7 normal situation. Because for the first time since the Byrne  
8 Judicial Assistance Grants were implemented -- were promulgated  
9 by Congress and implemented by the Department of Justice, the  
10 DOJ has imposed or has announced it will impose conditions on  
11 the receipt of that grant that we believe unlawfully and  
12 unconstitutionally recruit the City of Philadelphia to conduct  
13 the enforcement of its immigration regulatory system. And that  
14 is the reason why we are here today.

15 And Mr. Tulante, the City Solicitor, would like to  
16 speak to that issue --

17 THE COURT: Sure.

18 MS. GIBSON: -- personally.

19 THE COURT: Good afternoon. How are you?

20 MR. TULANTE: Good afternoon, Your Honor. And, Your  
21 Honor, first let me say thank you for your attention to this  
22 matter, and in particular the expedition in which you're  
23 addressing it.

24 Philadelphia, as is commonly known, is the poorest of  
25 our big city -- big cities with an incredible rate of poverty.

1 And the 1.8 million approximately that we're anticipating from  
2 this program is very integral to the city in terms of paying  
3 for police overtime and paying for the police officers.

4 And as my colleague had indicated, Ms. Gibson, we had  
5 received this grant without controversy under multiple  
6 administrations, Democratic and Republican, up until now. And  
7 the impact for the city really is our ability to do community  
8 policing, which clearly the Department of Justice promotes as  
9 well. We want to be able to have our officers go out there and  
10 investigate and solve crimes without regard to status  
11 information. And since we implicated -- implemented these  
12 policies, crime has gone down by 17 percent. And so our policy  
13 very clearly is that we would not collect immigration  
14 information and nor does federal law requires us to.

15 Now, that would change clearly if these conditions  
16 were implemented in part because it would make our officers be  
17 part of federal immigration enforcement. And the two policies  
18 that are really -- there are a couple of policies, but I want  
19 to highlight two. One is a police directive that was issued by  
20 then Police Commissioner John Timoney in 2001 and then  
21 subsequently by there's an executive order that was issued by  
22 Mayor Nutter in 2009. They really go to the core of allowing  
23 our residents, without regard to status, being able to avail  
24 themselves to the policies that are available to the city and  
25 to them.

1           And I know there's a lot -- one thing I really want  
2 to focus on, Your Honor, there's a lot of political talk and  
3 attention on detainers. And this case does not impact directly  
4 on whether or not, you know, we comply with detainers. I want  
5 to make that clear.

6           But that executive order touches on the same point  
7 that, you know, if we comply with detainers, you know, we would  
8 be then, one, there's some constitutional other issues involved  
9 with that. But then be part of the federal immigration  
10 proceedings.

11           And so what we require is that there be a judicial  
12 warrant signed by a district judge like Your Honor or a  
13 magistrate judge before we hold anyone. But also before we  
14 provide notification to ICE that there is somebody that they're  
15 interested in in our custody.

16           There are two conditions in addition to 1373 that are  
17 relevant here, Your Honor. Is one, respect to ICE seeking  
18 access to our detention facilities to interview any inmate, we  
19 do have a policy that allows ICE to do so at the consent of the  
20 inmate. And also, the inmate is alerted to his or her right to  
21 get counsel. And we think that that's reasonable and that's  
22 what you'd expect of any responsible municipality.

23           And for 78 percent of our inmate population, we have  
24 about 6,700 inmates in our six prisons, they're in pretrial  
25 detention. All right. So they haven't been adjudged guilty or

1 been found of violating any crime. And as the condition reads  
2 it, it talks about scheduled release. But if you look at most  
3 of our prisoners who are ultimately if they're released,  
4 there's no scheduled release, they're released only upon a  
5 judge -- they go to a bail hearing, a judge finds them that  
6 they can be released on bail. And there's no opportunity for  
7 us to provide ICE with 48 hours notice.

8           And, Your Honor, I know from my experience being at  
9 the U.S. Attorney's Office that it's integral for our local  
10 police to work with federal agencies. They do so on multiple  
11 task forces. They do so by inputting information into NCIC,  
12 inputting information into fingerprint databases. And so this  
13 is not a case where on one hand you have the city that doesn't  
14 want to comply with applicable law and the government is  
15 interested in law enforcement, we're both -- we're both in  
16 that. And one of the things I've been really focused on as  
17 city solicitor is try to continue promoting that relationship  
18 because I've seen it from the other side as an AUSA.

19           But I want to end where I started off, Your Honor. I  
20 appreciate that you see the public interest in this case and  
21 also the need for expeditious resolution because at the end of  
22 the day \$1.8 million means a lot to a city with our dire  
23 poverty.

24           THE COURT: All right. Thank you.

25           All right. Mr. Garg, do you want to respond? You

1 don't have to.

2 MR. GARG: No, Your Honor. We have no statement on  
3 the case today. We'll respond in due course.

4 THE COURT: Okay. By the way, I can't force you to  
5 do this but I strongly suggest that you have an Assistant U.S.  
6 Attorney from Philadelphia appear on the docket just in case we  
7 need to get a hold of somebody for some reason or act as local  
8 counsel. I think that would be a good idea in every civil case  
9 that the Department of Justice is counsel for a defendant. I'd  
10 like you to consider that.

11 MR. GARG: We'll take it under advisement, Your  
12 Honor. Thank you.

13 THE COURT: Okay. Ms. Gibson knows that was the  
14 practice when she and I were in the U.S. Attorney's Office  
15 together. I think it makes a lot of sense. I mean that  
16 doesn't mean you can't call the shots and do all the briefing,  
17 et cetera, but I think it's good to have a local AUSA on the  
18 docket sheet so they can receive information in a flash in case  
19 sometimes you want to call counsel and say one thing or the  
20 other, it maybe even to postpone a hearing for an hour. And  
21 it's a good idea to have a local person for that purpose.  
22 Which I appreciate your considering doing that.

23 Okay. Thank you very much for coming in everybody.  
24 Have a -- anything else from the plaintiffs? Okay.

25 MS. GIBSON: Thank you. Your Honor, Ms. Solow is



1 prepared to give you a brief summary of the legal issues, if --

2 THE COURT: Oh, okay.

3 MS. GIBSON: -- the Court so desires?

4 THE COURT: All right. Thank you.

5 MS. SOLOW: Your Honor, just a word about the nature  
6 of the claims we're bringing. And it goes to your question  
7 about why we don't think we need discovery at this point. And  
8 I think we're in agreement with the government on that for now.

9 These are essentially really questions of law. We  
10 are arguing that the imposition of these three new conditions  
11 by the Attorney General is not authorized by the statute, it's  
12 not authorized by the Constitution. And all that the Court  
13 really needs to do to resolve those claims is read the statute,  
14 read the legislative history, read how it's been implemented  
15 over time and then read the conditions that are going to be --  
16 have been advised to the public in these releases that the DOJ  
17 has put out and are going to be printed in the text of our  
18 grant award. And you can see that they're flatly contradicted  
19 by the type of authorization that the statute gives to the  
20 Attorney General in dispersing this grant and to what Congress  
21 had in mind when it created the grant program in the first  
22 place.

23 So we really don't think that the Court needs to do  
24 much of an exercise in factual analysis to resolve that major  
25 claim that we're bringing about the imposition of the -- of

1 these three conditions. There is a separate claim we have that  
2 might require some more factual exposition, which is we've also  
3 asked for a declaratory judgment that as to one of the  
4 conditions we are declaratively in compliance with that, which  
5 is that we comply with 8 U.S.C. 1373. And we've thought about  
6 the facts that the Court would need to resolve that claim for  
7 or against the city.

8           And our intention is that if we file a preliminary  
9 injunction motion at the end of the month or in early October,  
10 we would attach declarations to our PI motion. The  
11 declarations would be from city officials that explain what our  
12 policies and practices are, why they comply with the statute.  
13 And then those would likely be the very witnesses that we would  
14 present before the Court in a hearing thereafter.

15           And so again, we don't really think much discovery  
16 would be needed, all of the facts will be part of our PI  
17 motion. And then we would just develop them further during a  
18 hearing.

19           So that is our intention --

20           THE COURT: Um-hum.

21           MS. SOLOW: -- as to how we would develop our claims.

22           THE COURT: All right. Well, if that's your position  
23 have you thought about filing a motion for summary judgment?

24           MS. SOLOW: Not --

25           THE COURT: I mean if you're -- if the city believes

1 that a lot of these issues or most of them are legal ones that  
2 can be determined as a matter of law or based on the documents  
3 that you attached to your complaint, it would seem to me that  
4 we could have cross motions for summary judgment. And I'd like  
5 counsel to just think about that. You don't have to tell me  
6 now, but I think that might make a lot of sense in coming to a  
7 decision.

8           And I presume -- and as I said, I will expedite  
9 whatever is filed in this case. And I'm sure the Third Circuit  
10 would do the same. And whatever I might rule, and the losing  
11 party would likely appeal. And given the fact that you've got  
12 these other cases that would go to possibly the Seventh Circuit  
13 or the Ninth Circuit, eventually, you know, this may be an  
14 issue the Supreme Court would be interested in. But I'm -- we  
15 don't have to get that far. But I think you should all think  
16 about having cross motions for summary judgment promptly after  
17 the answer is filed.

18           MS. SOLOW: I think our assessment was that if the  
19 case does unfold in the typical course with a Rule 12 motion or  
20 an answer and a response, we could talk about asking to convert  
21 those papers into summary judgment papers. Because --

22           THE COURT: Right.

23           MS. SOLOW: -- there's a pretty strong chance that we  
24 wind up in a PI posture, in a preliminary injunction posture.

25           THE COURT: Correct.

1 MS. SOLOW: That might eclipse the need for a summary  
2 judgment.

3 THE COURT: Well, and that brings up -- well, first  
4 of all, the reason I asked the question about Rule 12(d),  
5 because if the government attaches documents to their -- to  
6 their motion to dismiss, I basically have to convert this to a  
7 Rule 56 motion. So there may be limited discovery, but then we  
8 could have -- then you could file a cross motion and raise  
9 these legal issues.

10 And the other thing that comes to mind in that same  
11 context is that you would file a motion for preliminary  
12 injunction but very possibly I would refer -- treat it as a  
13 final motion. And we'd take care of whatever discovery was  
14 outstanding. And then we might have briefing on the legal  
15 issues and then a hearing on any equitable issues. And from my  
16 point of view, all of this is possible before the end of the  
17 year. And I think it would be very much in the public interest  
18 to have a case like this resolved promptly.

19 So just think about it. Yes?

20 MS. GIBSON: Your Honor, we will certainly do that.

21 THE COURT: Okay.

22 MS. GIBSON: And we appreciate the --

23 THE COURT: All right.

24 MS. GIBSON: -- attention that you are placing on the  
25 city's claims. And we'll take your ideas into -- under

1 consideration and speak with counsel on the other side about  
2 them.

3 THE COURT: All right. Very good to see you all.  
4 Thanks for coming in. And have a nice day.

5 And, Mr. Garg, thank you for calling in.

6 MR. GARG: Thank you, Your Honor.

7 MR. TULANTE: Thank you, Your Honor.

8 MS. GIBSON: Thank you, Your Honor.

9 THE COURT: Court is adjourned.

10 (The proceeding concluded at 12:13 p.m.)

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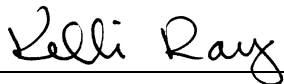
16

17 **C E R T I F I C A T I O N**

18 I, Kelli Ray, court approved transcriber, certify  
19 that the foregoing is a correct transcript from the official  
20 electronic sound recording of the proceedings in the above-  
21 entitled matter, and to the best of my ability.

22

23



24

Kelli Ray, CER-349

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DATE: October 12, 2017